

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NANCY A. QUANDT)	
Claimant)	
VS.)	
)	Docket No. 184,591
IBP, INC.)	
Self-Insured Respondent)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Respondent appealed the August 6, 2003 Order entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on May 11, 2004. Stacy Parkinson of Olathe, Kansas, served as Board Member Pro Tem in place of Board Member Gary M. Korte, who recused himself from this proceeding.

APPEARANCES

Robert R. Lee of Wichita, Kansas, appeared for claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for respondent. And Derek R. Chappell of Ottawa, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record for purposes of this appeal consists of the transcript from a February 4, 2000 hearing entitled Review and Modification Hearing, the transcript from an August 1, 2003 hearing entitled Application for Review and Modification Hearing, and the Division of Workers Compensation administrative file.

ISSUES

Respondent requested the Judge to conduct a final hearing, set terminal dates and enter a final order or award determining whether it or the Workers Compensation Fund (Fund) was liable for the temporary total disability benefits and medical expenses the Judge awarded claimant in a February 11, 2000 Order for Compensation. In the August 6, 2003 Order, which is the subject of this appeal, Judge Avery denied respondent's

requests, concluding the Division of Workers Compensation lacked jurisdiction to address those requests.

Respondent contends Judge Avery erred. Respondent argues the February 11, 2000 Order for Compensation was entered as a preliminary hearing order in claimant's request to review and modify the final Award, which was entered on May 27, 1997, by Administrative Law Judge Floyd V. Palmer and later affirmed by this Board in a January 16, 1998 Order. Accordingly, respondent contends it is entitled to a final hearing on the issue of the Fund's liability and requests the Board to remand the proceeding to the Judge to conduct a final hearing on that issue and rule upon its requests for reimbursement.

In the alternative, respondent requests the Board to set aside the February 11, 2000 Order for Compensation and hold that claimant was not entitled to compensation for a low back injury first raised at a post-award proceeding where such injury was not included in the original claim. Or, in the alternative, respondent requests the Board, as a matter of law, to assess all of the liability for claimant's low back condition to the Workers Compensation Fund and also order the Fund to reimburse respondent all the money it has paid pursuant to the February 11, 2000 Order for Compensation.

Conversely, claimant argues respondent should have appealed the February 11, 2000 Order for Compensation when it was entered, and the Board should not now grant respondent's request for a final hearing as the February 4, 2000 hearing was, in effect, the final hearing. Should the Board entertain respondent's appeal of the August 6, 2003 Order, claimant argues the Board should affirm the February 11, 2000 Order for Compensation.

Finally, the Workers Compensation Fund also contends the Board should affirm the August 6, 2003 Order. The Fund argues respondent should have appealed the February 11, 2000 Order for Compensation if it disagreed with the Judge's conclusion that it was responsible for claimant's low back condition. In the alternative, should the Board determine the February 4, 2000 hearing was a preliminary hearing, the Fund requests the Board to remand this proceeding to the Judge for terminal dates to be set and for the parties to present their testimony on the substantive issues.

The issue before the Board on this appeal is whether the Judge erred in determining the Division of Workers Compensation lacked jurisdiction to conduct a final hearing to address claimant's request for post-award temporary total disability benefits and post-award medical benefits for her low back condition and to address the issue of Fund liability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record identified above, the Board finds and concludes:

This claim amply demonstrates the problems that arose in post-award requests for temporary total disability benefits and additional medical treatment before the legislature enacted the post-award medical statute, K.S.A. 44-510k, when a judge would fail to clearly designate whether the hearing being conducted and the order later entered were pursuant to the preliminary hearing statute (K.S.A. 44-534a) or a final hearing. In 2000, the Kansas legislature enacted K.S.A. 44-510k, which alleviated the confusion in post-award requests for medical treatment. However, confusion remains in requests for post-award temporary total disability benefits.

Before K.S.A. 44-510k was enacted, the Board interpreted the Workers Compensation Act to permit parties to request post-award temporary total disability benefits and post-award medical treatment under the preliminary hearing statute, K.S.A. 44-534a. The Board reasoned a worker's need for immediate medical treatment and living expense could be equally urgent after an award as before the initial final award. The failure to obtain prompt treatment could result in needless suffering and even irreparable injury. In addition, two statutes in the Act specifically referred to post-award preliminary hearings.¹

Consequently, before passage of K.S.A. 44-510k, the Board held in other claims that the parties were permitted to have a post-award preliminary hearing to address temporary total disability and additional medical treatment, subject to modification upon a full and final hearing on the issues regarding the post-award request. By so holding, the parties were permitted a prompt summary hearing to address claimant's request for preliminary hearing benefits, with knowledge that the judge would later entertain a final hearing to address the relevant issues. The more relaxed evidentiary rules in K.S.A. 44-534a were applied to post-award preliminary hearings and the evidentiary rules for final hearings were applied to the post-award final hearings, unless the parties otherwise agreed.

The final Award in this claim was entered on May 27, 1997, by Administrative Law Judge Floyd V. Palmer. That Award was appealed to this Board, which affirmed the Award by its January 16, 1998 Order.

After the final Award was entered, claimant's low back worsened to the point that she needed medical attention. On May 21, 1999, Judge Avery conducted a hearing to address claimant's request for a doctor to be authorized to treat claimant. Following that hearing, the Judge appointed a doctor to evaluate claimant and provide an expert medical opinion whether claimant's low back symptoms were caused, accelerated, or aggravated

¹ K.S.A. 44-551(b)(2)(C) and K.S.A. 44-556(g).

by her March 1993 accident. However, before claimant saw the doctor selected by the Judge, she underwent low back surgery.

Upon receiving a request and an amended request to review and modify the initial final Award, Judge Avery conducted the February 4, 2000 hearing to address post-award medical benefits. Despite the fact claimant was requesting ongoing medical treatment and temporary total disability benefits, which are preliminary hearing issues,² the record does not reflect the Judge and parties discussed whether the hearing was being conducted as a preliminary hearing to be followed at a later time with depositions and a final hearing to address the Fund liability issues or whether the February 4, 2000 hearing was to be considered the final hearing on claimant's post-award requests.

At the February 4, 2000 hearing, the parties advised Judge Avery there were issues regarding the Fund's liability as the initial final Award assessed the entire liability for claimant's neck and right knee to the Fund but the low back had not been previously addressed. In addition, respondent advised the Judge that claimant's low back complaints might have resulted as a natural and probable consequence of the right knee injury. In any event, the Judge neither set terminal dates for the parties to provide their evidence nor requested submission letters setting forth their arguments.

The parties presented no medical evidence at the February 2000 hearing, as the relevant medical evidence had been presented at a May 1999 hearing. At that hearing, claimant and the Fund introduced medical reports without the health providers' supporting testimony.

On February 11, 2000, Judge Avery issued an Order for Compensation. That Order reads:

Now on this 4th day of February, 2000, the claimant's Application for Preliminary Hearing comes on for hearing before the Administrative Law Judge for the Division of Workers Compensation of the State of Kansas. After hearing the evidence and arguments of counsel, it is found that:

Temporary total disability compensation is hereby granted and ordered paid by respondent and insurance carrier at the rate of \$215.84 per week, commencing April 7, 1999 until further order, or until certified as having reached maximum medical improvement; or released to regular job; or until returned to gainful employment, whichever occurs first.

² See K.S.A. 44-534a.

Medical treatment is ordered to be paid by respondent and insurance carrier on claimant's behalf with Dr. Bowman for treatment of claimant's back until further order or until certified as having reached maximum medical improvement.

Cost for temporary total disability and medical treatment to the back is assessed against the respondent, IBP, Inc. Claimant did not have a pre-existing back condition.

IT IS SO ORDERED.

Dated this 11th day of February, 2000.

Considering all the facts and circumstances, the Board concludes the February 11, 2000 Order for Compensation was issued as a post-award preliminary hearing order in a review and modification proceeding. The Board finds the February 4, 2000 hearing was conducted as a post-award preliminary hearing in a review and modification proceeding to address whether claimant's medical condition warranted temporary total disability benefits and medical treatment.

First, the benefits that claimant sought at the February 4, 2000 hearing were preliminary hearing benefits as set forth in K.S.A. 44-534a. Second, the Judge did not designate or announce at the hearing that it was being conducted as a full and final hearing regarding Fund liability. Third, the Judge did not set terminal dates for the parties to submit their evidence regarding Fund liability. Nor did the Judge request submission letters from the parties setting forth their arguments. Fourth, the Order for Compensation reads as a preliminary hearing order as it awards temporary total disability benefits until claimant reached maximum medical improvement, was released to her regular job, or was returned to substantial gainful employment. Likewise, claimant was entitled to receive medical treatment until she reached maximum medical improvement. And fifth, it is apparent from the statements made by the attorneys at the February 2000 hearing that the parties anticipated presenting additional evidence on the unresolved issues as additional depositions are mentioned.

The Board concludes the February 11, 2000 Order for Compensation was not issued following a full and final hearing regarding Fund liability. Consequently, this claim should be remanded to the Judge to schedule this claim for a full hearing, to set terminal dates for the parties to present evidence, and for the Judge to issue a final decision regarding claimant's right to receive post-award benefits for her low back and Fund liability.

AWARD

WHEREFORE, the Board remands this claim to Judge Avery to conduct a full and final hearing regarding claimant's entitlement to post-award benefits and Fund liability, set terminal dates, and issue a final decision regarding those issues.

IT IS SO ORDERED.

Dated this ____ day of July 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully dissent from the majority decision that the February 11, 2000 Order for Compensation was not a full and final order regarding medical treatment for claimant's low back as well as the determination of liability between respondent and the Workers Compensation Fund for that condition.

It is undisputed that the February 11, 2000 Order involved claimant's request for medical benefits after the final award had been made in the case. The claimant filed an application for review and modification seeking additional medical treatment. The Workers Compensation Fund filed a motion that the ALJ also determine at that hearing the liability between respondent and the Fund regarding any potential treatment for claimant's low back.

At the hearing held on February 4, 2000, the ALJ specifically noted the proceeding was a review and modification proceeding. The Judge stated:

JUDGE AVERY: This is the case of Nancy Quandt versus IBP, Incorporated, Docket No. 184,591. We're here for a Review and Modification Hearing on the issue of additional medical treatment. . . .³

The ALJ then noted that he would let the parties state their respective positions. The claimant's attorney also mentioned that attorney fees were an issue but noted that issue could be deferred until later. The Fund's attorney then noted that the issue of Fund liability for the low back, if such condition was determined to be work-related, was disputed. Lastly, respondent's attorney noted there was a question whether respondent was aware whether claimant had a preexisting back condition but there remained the issue whether the back complaints were the result of an altered gait from the knee injury which would place liability on the Fund. And respondent noted there remained the issue of causation of the back injury.

The ALJ then requested claimant's attorney to call his first witness. Claimant's attorney noted that he did not have any testimony that he wanted to present and that the primary issue for determination at the hearing was the liability between respondent and the Fund. Consequently, the respondent called claimant as a witness and mainly inquired whether claimant had a preexisting back condition or problems with her back before the work-related accident. This questioning was obviously intended to elicit facts to warrant shifting liability for claimant's back treatment, if any, to the Fund. The Fund's attorney also questioned claimant regarding any preexisting back complaints, treatment for her back or restrictions relating to her back before the work-related injury. Again, this questioning was designed to elicit facts to prevent shifting liability for claimant's back treatment, if any, to the Fund.

The facts demonstrate and the ALJ noted that the proceeding was a review and modification hearing. Moreover, the issue of the liability between the respondent and the Fund for medical treatment for claimant's back condition was the primary matter addressed at the hearing. Neither respondent nor the Fund requested that the ALJ set terminal dates so that additional evidence could be presented.

The ALJ issued his decision specifically finding that respondent was liable for the cost for medical treatment for claimant's back, noting claimant did not have a preexisting back condition. Absent a preexisting back condition, liability could not be shifted to the Fund. The claimant was not questioned regarding an altered gait. A review of this decision was not requested by respondent. And even though the order reads as a preliminary hearing order might read, that does not alter the fact that the decision was entered after a review and modification proceeding.

³ R.M.H. Trans. (Feb. 4, 2000) at 4.

The law in effect at the time of the February 4, 2000 hearing provided that decisions from review and modification proceedings were final orders and subject to review by the Board. Moreover, even if the proceeding was considered some type of post-award preliminary hearing, as determined by the majority, such decisions were also considered final and subject to review by the Board.⁴

Absent a request for review, the ALJ's determination of liability between respondent and the Fund for the medical treatment for claimant's back is binding upon respondent. Consequently, I would affirm the ALJ's determination that he did not have jurisdiction because the issues had been determined in a final order.

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Derek R. Chappell, Attorney for Fund
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁴ *Bryant v. U.S.D. No. 259*, 26 Kan. App. 2d 435, 992 P.2d 808 (1999).